Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Fox Television Stations, Inc.	)	
	)	
Application for Renewal of License of KTTV, Los Angeles, California	)	File No. BRCDT-20140731AKV

CONSOLIDATED OPPOSITION OF FOX TELEVISION STATIONS, INC. TO PETITIONS TO DENY

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EXECUTIVE SUMMARY

Fox Television Stations, Inc. ("Fox"), licensee of station KTTV(TV), Los Angeles, California ("KTTV" or the "Station"), hereby opposes the Petitions to Deny filed by Timothy Harjo, Larry W. Smith, and Jennifer Varenchik (collectively, the "Petitions"), which inappropriately seek to thrust the Commission into the unconstitutional role of regulating speech based on its content. Specifically, the Petitions contend that KTTV's license renewal application should be denied because the Station "deliberately, repeatedly, and unnecessarily broadcasts the word 'R*dskins'" when referring to the Washington Redskins professional football team. The Petitioners consider the word "Redskins" to be a "disparaging racially derogatory slur" even when used in the football context, and the Petitioners argue that the Commission should punish KTTV and other broadcast stations for airing the word more often than is "necessary" in Petitioners' view.

At their core, the Petitions erroneously rely on the assertion that the Commission may regulate the content of broadcast stations' speech — even speech that does not fall under any "existing categor[y] of regulated content" — if the Commission deems that speech to be inconsistent "with a broadcaster's mandatory legal obligations to operate in the public interest." The law is to the contrary, and the Commission has stated unequivocally that in light of statutory and First Amendment constraints on its authority, it will not deny license renewals on the basis of viewers' subjective determinations of what programming is "appropriate." Indeed, the Commission has consistently and repeatedly refused to take adverse action against a license renewal, or to otherwise penalize broadcasters, even when stations have aired universally acknowledged racial slurs. These well-settled principles foreclose Petitioners' attempt to substitute for the Station's editorial judgment their own personal views as to how news and information should be presented.

Similarly, even if Petitioners could establish that the word "Redskins" is equivalent to universally acknowledged racial epithets, Commission precedent is clear that these epithets, however offensive they may be to some viewers, do not qualify as prohibited "profanity" or "indecency." The Petitions likewise offer no legal support whatsoever for the proposition that such words may be banned as "hate speech." Controlling First Amendment law also refutes Petitioners' arguments that KTTV's use of the word "Redskins" may be punished as obscenity or "fighting words." In short, there is no legal basis for treating references to the Washington Redskins as outside the bounds of the First Amendment's protection.

Even if the Commission could proscribe the future use of the word "Redskins" on broadcast stations — which it cannot — it nonetheless would be unlawful to deny KTTV's license renewal application based on such a novel ruling. Nothing in the Commission's precedents could have given Fox or any other broadcaster fair notice that the Commission could or would penalize a station for referring to the Washington Redskins by the team's name. Constitutional Due Process requirements and the Administrative Procedure Act forbid the Commission from penalizing stations for failing to anticipate a reversal of the Commission's settled rules, especially when those rules touch upon sensitive First Amendment interests. Accordingly, denying KTTV's license renewal would be arbitrary, capricious, and unlawful.

Given that the Petitioners cannot show any legal basis on which KTTV's license renewal application could be denied, the Petitions fail to present even a *prima facie* question — much less a substantial and material one — regarding KTTV's qualification for renewal. Accordingly, the Communications Act requires the Commission to dismiss or deny the Petitions, and KTTV's license renewal should be granted forthwith.

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INTRODUCTION

Fox Television Stations, Inc. ("Fox"), licensee of station KTTV(TV), Los Angeles, California ("KTTV" or the "Station"), hereby opposes the Petitions to Deny filed by Timothy Harjo (the "Harjo Petition"), Larry W. Smith (the "Smith Petition"), and Jennifer Varenchik (the "Varenchik Petition," and collectively with the Harjo and Smith Petitions, the "Petitions"), pursuant to Section 73.3584(b) of the Commission's rules.[1] The Petitions inappropriately seek to thrust the Commission into the unconstitutional role of regulating speech based on its content. In doing so, the Petitioners would have the Commission trample Fox's constitutional rights and intrude into the editorial discretion that lies at the very heart of the First Amendment's core free speech and free press protections. Because the Petitioners cannot possibly meet the exceedingly high burden imposed by the Commission on those attempting to

[1] 47 C.F.R. § 73.3584(b). The Petitions were filed on October 31, 2014, meaning the thirtieth day after filing was Sunday, November 30, 2014. Accordingly, this Opposition is timely filed on the next business day. *See* 47 C.F.R. § 1.4(e)(1), (j). Because the Petitions are substantively identical, citations in this Opposition to an individual Petition also should be read to refer to the parallel portions of the other Petitions unless otherwise indicated.

challenge a license renewal on the basis of a licensee's content selection, the Petitions should be dismissed or denied.

The Petitioners contend that the Commission should deny KTTV's license renewal application because the Station "deliberately, repeatedly, and unnecessarily broadcasts the word 'R*dskins', both in spoken and written form, frequently during many of its broadcasting days, and especially in prime time."[2] The Petitioners contend that the word "Redskins" is a "disparaging racially derogatory slur" and strongly object to the use of that word as the name of Washington, D.C.'s professional football team. [3] Fox takes no position on whether Washington's football team should change its name. What is clear, however, is that the Commission has no authority to require such a change. Just as clearly, the Commission may not prohibit KTTV from using the team's name in the Station's reporting or penalize it for doing so. Petitioners' arguments to the contrary ignore Fox's First Amendment and Due Process rights and the Commission's settled precedents.

The Communications Act establishes that broadcast station licenses shall be renewed so long as, during the previous license term (1) "the station has served the public interest, convenience, and necessity," (2) there have been no serious violations of the Communications Act or Commission rules, and (3) there have been no other violations that "would constitute a pattern of abuse."[4] A petition to deny must satisfy the two-step test set out in Section 309(d) of the Act.[5] First, a petition must "contain specific allegations of fact

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[2] Harjo Petition at 1.

[3] Harjo Petition at 4.

[4] 47 U.S.C. § 309(k)(1).

[5] 47 U.S.C. § 309(d). *See also Astroline Comm'cns Co. v. FCC*, 857 F. 2d 1556, 1561 (D.C. Cir. 1988).

sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with" the renewal standard.[6] If a petitioner satisfies this threshold inquiry, the Commission must determine whether, in light of all the evidence, the petition raises any "substantial and material questions of fact" regarding whether renewal is warranted.[7] Congress established this two-step inquiry "to significantly heighten the burden a petitioner must satisfy in order to obtain an evidentiary hearing" regarding allegations raised in licensing proceedings.[8] Moreover, allegations implicating the content of a licensee's programming face an especially heavy burden. The Commission has explained that "because news and comment programming are at the core of speech which the First Amendment is intended to protect, we have long believed that a particularly high threshold should govern Commission intervention in this area."[9]

The Petitions fail to present even a *prima facie* question — much less a "substantial and material" one — regarding KTTV's qualification for renewal.[10] Apart from the Petitions' meritless arguments that the word "Redskins" may be treated as obscenity, indecency, or profanity, the Petitions do not allege any violation of the Communications Act or any Commission rule, nor do they challenge (or even discuss) the Station's record of service to its community. Rather, the Petitions inappropriately ask the Commission to deny KTTV's renewal

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[6] § 309(d)(1).

[7] § 309(d)(2).

[8] *Gencom Inc. v. FCC*, 832 F.2d 171, 180 (D.C. Cir. 1987).

[9] *NPR Phoenix, L.L.C.*, Mem. Op. & Order, 13 FCC Rcd 14070, 14072 (MMB 1998).

[10] Moreover, though the Petitions purport to "reserve the right to supplement and otherwise amplify upon this petition," *see* Harjo Petition at 2, Petitioners may not use such supplemental filings to cure their failure to present a *prima facie* question. *See Blue Ridge Public Television, Inc.*, Mem. Op. & Order, 12 FCC Rcd 4634, 4637 n.5 ("Because Rainbow failed to establish a prima facie case in its petition [to deny], we will not consider the new allegations presented in this supplementary filing.").

solely because Petitioners are offended by the Station's programming.[11] The Commission has long made clear that the First Amendment bars it from taking adverse action on a license renewal application based upon the subjective determination of a group of viewers regarding a licensee's editorial choices. Accordingly, the Petitioners cannot possibly meet their heavy burden, and the Commission should dismiss or deny the Petitions and renew KTTV's license forthwith.

I. THE COMMISSION MAY NOT PROHIBIT PROTECTED SPEECH BASED ON A GENERALIZED ASSERTION THAT THE CONTENT OF THE SPEECH IS OFFENSIVE OR OTHERWISE NOT IN THE PUBLIC INTEREST.

Although the Petitions advance a variety of flawed legal theories, at their core they rely on the assertion that the Commission has free-ranging authority to regulate the content of broadcast stations' speech — even speech that does not fall under any "existing categor[y] of regulated content" — if the Commission deems that speech to be inconsistent "with a broadcaster's mandatory legal obligations to operate in the public interest."[12] The law is to the contrary. Nor is there any legal basis for treating references to the Washington Redskins as outside the bounds of the First Amendment's protection.

A. Given the Critical First Amendment Implications, a Petition to Deny That Makes Allegations Concerning Programming Choices Faces a Particularly High Burden.

The Commission has been careful to note that, because the First Amendment and Section 326 of the Communications Act "prohibit the Commission from censoring program

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[11] The Petitions also allege that allowing the use of the word "Redskins" to refer to the Washington football team creates a "hostile work environment" for station employees. Harjo Petition at 16. This employment-law claim is both meritless and beyond the Commission's authority to adjudicate. *See Shareholders of Stop 26 Riverbend, Inc.*, Mem. Op. & Order, 27 FCC Rcd 6516, 6524 (2012) ("It is well established that unadjudicated allegations of misconduct not involving the Communications Act or Commission rules or policies normally do not constitute the basis of a prima facie showing that an applicant lacks the character qualifications to be a Commission licensee.").

[12] Harjo Petition at 4-5.

material or interfering with broadcasters' free speech rights," broadcasters have "broad discretion in determining the programming that they choose to air," even if some viewers "may find viewpoints presented on the Station to be offensive."[13] The Commission accordingly has made clear that it "will not take adverse action on a license renewal application based upon the subjective determination of a listener or group of listeners as to what constitutes appropriate programming."[14] This well-settled principle forecloses Petitioners' attempt to substitute for the Station's editorial judgment their own personal views as to how news and information should be presented.

Even if the word "Redskins" were deemed to be a racial slur no different from the worst epithets applied to other groups, Petitioners' fundamental premise — that the Commission would deny a license renewal to, or otherwise penalize, a station that aired such racial slurs — is refuted by the Commission's own precedents. In considering an objection to the license renewal of a station that the objector alleged had aired racist material, the Commission made clear that even "[w]ith respect to offensive or racist statements made on air ... we would not interfere because 'if there is to be free speech, it must be free for speech that we abhor and hate as well as for speech that we find tolerable or congenial.'"[15] In situations when stations have aired highly offensive epithets such as "wetback"[16] or "nigger,"[17] the Commission has concluded that it may not penalize them for doing so. The First Amendment demands that these questions remain

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[13] *See Mr. J.C. Olszowka*, Letter, 22 FCC Rcd 5579, 5580 (MB 2007).

[14] *Applications of Citicasters Licenses, L.P. & AMFM Broad. Licenses*, LLC, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 19324, 19331 (2007) (footnotes omitted).

[15] *Eagle Radio, Inc.*, Mem. Op. & Order, 9 FCC Rcd 1294, 1295 (1994) (citing *Anti–Defamation League of B'nai B'rith*, 4 F.C.C.2d 190, 192 (1966), *aff'd* 6 F.C.C.2d 385 (1967)).

[16] *Doubleday Broadcasting Co.*, Mem. Op. & Order, 56 F.C.C.2d 333, 338 (1975)

[17] *Julian Bond*, Letter, 69 F.C.C.2d 943, 944 (Broad. Bur. 1978).

matters of editorial discretion, not government regulation, and the Petitions acknowledge that media outlets can and do exercise such judgment without government coercion.[18]

The precedents Petitioners hold out to suggest that the Commission may revoke a license based on speech it deems not in the public interest stand for no such proposition. For instance, the Petitions erroneously assert that the Commission held "that licensees are responsible for the possible (even if not probable) harms allegedly caused by song lyrics which might 'promote or glorify the use of illegal drugs.'"[19] To the contrary, as the D.C. Circuit recognized in the very case cited by Petitioners, the Commission made clear that "(1) the Commission was not prohibiting the playing of 'drug oriented' records, [and] (2) no reprisals would be taken against stations that played 'drug oriented' music."[20] The Commission required only that the licensee be sufficiently aware of the content it was airing in order to make its own judgment about the suitability of the content.[21] The Commission refused to substitute its judgment for the licensee's, as Petitioners would have the Commission do here. Similarly, a D.C. Circuit decision to vacate the Commission's grant of a license renewal to a Jackson, Mississippi, television station was based not on the broadcast of "a mere few disparaging remarks based upon race (about 'Negros')," as the Petitions suggest,[22] but rather on the station's pervasively one-sided coverage of racial issues in violation of the (now abandoned) Fairness Doctrine, which at the time was an enforceable Commission rule.[23] Finally, in the license-

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[18] Harjo Petition at 7, 11-12.

[19] Harjo Petition at 3-4 (citing *Yale Broadcasting Co. v. FCC*, 478 F.2d 594 (D.C. Cir. 1973)).

[20] *Yale Broadcasting Co.*, 478 F.2d at 596.

[21] *Id.*

[22] Harjo Petition at 4.

[23] *See Office of Communication of United Church of Christ v. FCC*, 425 F.2d 543, 545, 548-50 (D.C. Cir. 1969). The Petitions' reliance on this case in support of the proposition that the (continued...)

renewal challenge at issue in *Stone v. FCC*, the only deficiency in the station's performance even arguably established by the petitioners, which was corrected prior to the station's renewal grant, related to the station's *non-speech* conduct — specifically, its efforts to ascertain the needs of the community.[24] Nothing in the case so much as hints at any authority to regulate a station's *content* based on the Commission's (or viewers') perspective of what speech is in the public interest. The Commission actually *rejected* contentions by the *Stone* petitioners that the station's programming was insufficiently responsive, "since the station's programming came within the discretion afforded licensees with respect to program content."[25] In short, there is no authority supporting the Petitions' contention that the Commission may broadly regulate broadcasters' content choices based on any self-appointed editor's alternative view of what content is in the public interest.

B. The Station's References to the Washington Redskins Are Protected Speech.

The Commission also should reject the Petitions' baseless suggestion that the word "Redskins" is unprotected by the First Amendment as either a "fighting word" or "hate speech." "Fighting words" are a limited class of unprotected expression consisting of "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."[26] In the football context,

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Commission may deny license renewals based on disagreement with a station's content decisions is further weakened by the fact that "[t]he Commission abrogated the fairness doctrine in 1987, after concluding that it no longer served the public interest, was not statutorily mandated, and was inconsistent with First Amendment values." *Amendment of Parts 1, 73 and 76 of the Commission's Rules et al.*, Order, 26 FCC Rcd 11422, 11422 (MB 2011) (citing *Syracuse Peace Council*, 2 FCC Rcd 5043 (1987)).

[24] *Stone v. FCC*, 466 F.2d 316, 323-25, 331-32 (D.C. Cir. 1972).

[25] *Stone*, 466 F.2d at 321.

[26] *Virginia v. Black*, 538 U.S. 343, 359 (2003) (quoting *Cohen v. California*, 403 U.S. 15, 20 (1971)).

"Redskins" is not such a word. Fighting words may be proscribed only when an "individual actually or likely to be present could reasonably have regarded the words ... as a direct personal insult."[27] Moreover, "speech inflicting psychic trauma alone — without any tendency to provoke responsive violence or an immediate breach of the peace — does not lose constitutional protection under the fighting-words doctrine."[28] No one hearing the word "Redskins," in a broadcast widely available to millions of viewers and used in relation to Washington's football team, could reasonably conclude that the term was personally directed as an insult to any particular individual.[29] Nor have Petitioners provided any basis on which to conclude that the use of the Redskins name in the football context — as it is aired countless times across the country every day — is inherently likely to provoke a violent response. Indeed, Petitioners have cited not a single such incident. Petitioners' identical conclusory assertions that they have "experienced and/or witnessed harm to myself and/or to other Native Americans which I believe was caused by the frequent repetitive use of the word 'R*dskins' on the air"[30] do not come close to satisfying their burden to raise a *prima facie* issue based on "specific allegations of fact."[31] Accordingly, the fighting words doctrine has no relevance here.

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[27] *Cohen*, 403 U.S. at 20.

[28] *Purtell v. Mason*, 527 F.3d 615, 624 (7th Cir. 2008).

[29] Indeed, the Commission has expressed its skepticism that the fighting words doctrine can apply in the broadcast context because "[g]iven the nature of television and radio, it appears unlikely that broadcast material would provoke immediate violence between those uttering such words and the audience." *Complaints Regarding Various Television Broadcasts Between February 2, 2002 & March 8, 2005*, NAL and Mem. Op. & Order, 21 FCC Rcd 2664, 2669 (2006) ("*Omnibus Order*"), *vacated in part on other grounds*, 21 FCC Rcd 13299, 13329 (2006).

[30] Harjo Petition at Affidavit ¶ 6; Smith Petition at Affidavit ¶ 7; Varenchik Petition at Affidavit ¶ 7.

[31] *See* 47 U.S.C. § 309(d)(1).

Petitioners' further contention that the Commission may ban the word "Redskins" as "hate speech" has even less support.[32] Petitioners cite no accepted legal definition of "hate speech," though they apparently intend for it to include not only "fighting words" but also any speech that "disparages or intimidates a protected individual or group."[33] Moreover, even assuming that the use of "Redskins" to refer to Washington's football team would fall under Petitioners' proposed "hate speech" definition, the Petitions cite no legal authority for the proposition that the Commission may punish licensees for airing such speech. As discussed above, the relevant precedents are directly to the contrary.[34] Punishing the Station based on a brand-new, previously unannounced prohibition would be unlawful.[35] Indeed, it appears one of the main purposes of raising this argument is simply to implicate the license renewal process in an attempt to force action on a broader agenda.[36] The Commission should not countenance such conduct.[37]

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[32] Harjo Petition at 14-16.

[33] Harjo Petition at 14.

[34] *See supra* p. 5.

[35] *See infra* Section III.

[36] Harjo Petition at 15-16 (noting that "[a] petition seeking to deny a license renewal pursuant to 47 U.S.C.A. § 309(d) — unlike a general petition to the agency — does by law require a response," and asking the Commission to "consider [the Petition] as a request to investigate, through a hearing and/or other appropriate means," various issues relating to hate speech in general).

[37] What is even more troubling is that published reports suggest that the Petitions may be part of a broader campaign to use the collateral effects of a contested renewal proceeding to pressure broadcast stations into acceding to the demands of Petitioners and their allies, regardless of the legal merits of such renewal challenges. George Washington University law professor John Banzhaf III told *The Hollywood Reporter* that he planned to recruit petitioners to oppose the renewal applications of Los Angeles television stations based on their use of the Redskins name. *See* Alex Ben Block, "How the Washington Redskins Name Debate Could Ensnare L.A. TV Stations," *The Hollywood Reporter*, http://www.hollywoodreporter.com/news/how-washington-redskins-name-debate-738838 (Oct. 8, 2014). Banzhaf reportedly told *THR* that "[t]he FCC moves like molasses" and that this delay is part of Banzhaf's strategy. *Id.* Banzhaf reportedly (continued...)

II. THE WORD 'REDSKINS' DOES NOT QUALIFY AS OBSCENITY, INDECENCY, OR PROFANITY.

In addition to their assertion that the Commission may ban speech it finds generally contrary to the public interest, Petitioners argue the Commission may penalize KTTV for airing the word "Redskins" under the Commission's authority to regulate or prohibit the broadcast of "obscene, indecent, or profane language."[38] Petitioners again are mistaken; the word "Redskins" does not qualify as obscene, indecent, or profane under the relevant legal definitions.

A. The Word "Redskins" is Neither Obscene nor Indecent.

The Petitions' attempt to shoehorn "Redskins" into the definition of obscenity relies largely on a letter written to Redskins owner Daniel Snyder and signed by twelve broadcast-law practitioners.[39] The letter correctly states that current law does not permit the broadcast of "obscene pornographic language on live television."[40] Contrary to the Petitions' characterization, however, this letter does *not* state that the word "Redskins" is "akin to

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told *THR* that he planned to use the threat of contesting license renewals to extract agreements from other stations to no longer use the Redskins name. *Id.* Banzhaf provided his template demand letter to *Broadcasting & Cable*; the letter threatens to file a petition to deny the recipient's license renewal and notes that "the mere filing of such a document may cause considerable problems for the station, including affecting its credit rating, its ability to be sold or transferred, etc." *See* John Eggerton, "Banzhaf Vows to Challenge L.A. Station Over 'Redskins,'" *Broadcasting & Cable*, http://www.broadcastingcable.com/news/washington/banzhaf-vows-challenge-la-station-over-redskins/134213 (Sept. 22, 2014). A subsequent report in *Broadcasting & Cable* appears to confirm that the instant Petitions are part of Banzhaf's campaign. *See* John Eggerton, "Banzhaf: KTTV License Challenged Over 'Redskins,'" http://www.broadcastingcable.com/news/washington/banzhaf-kttv-license-challenged-over-redskins/135299 (Nov. 2, 2014). Given these reports, the Commission should investigate whether Banzhaf's stratagem amounts to an egregious abuse of the Commission's processes.

[38] *See* Harjo Petition at 5, 7; 18 U.S.C. § 1464; 47 C.F.R. § 73.3999.

[39] Harjo Petition at 5-6.

[40] Harjo Petition at 5.

obscenity and pornography."[41] The broadcast-law practitioners who signed the letter did not hazard any such argument — and for good reason. Under the controlling definition of obscenity set by the U.S. Supreme Court, material may be considered legally obscene only if (a) "the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest," (b) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," and (c) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[42] The Petitions do not and could not make any argument that "Redskins" — a word with no sexual connotation whatsoever — fits within this definition, nor does the Commission have any authority to expand on the Supreme Court's definition of obscenity.

Petitioners fare no better in their attempt to brand the word "Redskins" as indecent. "The Commission defines indecent speech as language that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium."[43] Petitioners do not argue that "Redskins" depicts or describes a sexual or excretory activity or organ. And their assertion that the Commission has "expand[ed] its previous definition of 'indecency' to include broadcasting material which neither 'depicts' nor 'describes' sexual activities" is flatly incorrect.[44] To the contrary, the Commission's holding that any use of the word "fuck" may fall within the

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[41] Harjo Petition at 6.

[42] *Reno v. ACLU*, 521 U.S. 844, 872 (1997) (quoting *Miller v. California*, 413 U. S. 15, 24 (1973)).

[43] *Complaints Against Various Broadcast Licensees Regarding Their Airing of the 'Golden Globe Awards' Program*, Mem. Op. & Order, 19 FCC Rcd 4975, 4977 (2004) (internal quotations omitted) ("*Golden Globes Order*").

[44] Harjo Petition at 5.

indecency definition derived from the Commission's determination that "any use of that word or a variation, in any context, inherently has a sexual connotation."[45] Whatever the merits of that determination, it is clear that words with no sexual or excretory connotation — such as "Redskins" — may not be deemed to violate the Commission's restrictions on indecent speech.

B. In the Football Context, 'Redskins' Does Not Qualify as Profanity.

Petitioners' attempt to classify the word "Redskins" as "profanity" not only contradicts the Commission's precedents but also would run afoul of the First Amendment. The Commission defines profanity as "vulgar and coarse language so grossly offensive to members of the public who actually hear it as to amount to a nuisance."[46] The Petitions, applying common dictionary definitions of "nuisance," would have the Commission treat any language that is "annoying and offensive" to some set of viewers as potentially sanctionable profanity.[47] The First Amendment does not permit the Commission to impose so broad a restriction. The Commission has recognized that "[t]he First Amendment and Section 326 of the Communications Act impose severe restrictions on the scope of the Commission's authority in enforcing the statutory prohibition against the broadcast of 'obscene, profane or indecent language.'"[48] Thus, although the Commission has held that "fuck" and "shit" qualify as profanity,[49] it has declined to treat even the worst racial epithets as falling within the statutory prohibition.[50] Instead, the Commission has stated that profanity is "limited to the universe of

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[45] *Golden Globes Order*, 19 FCC Rcd at 4978.

[46] *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 13299, 13314 (2006) ("*Omnibus Remand Order*").

[47] Harjo Petition at 12.

[48] *Julian Bond*, 69 F.C.C.2d at 944.

[49] *Omnibus Remand Order*, 21 FCC Rcd at 13314-15.

[50] *Julian Bond*, 69 F.C.C.2d at 944.

words that are sexual or excretory in nature or are derived from such terms."[51] Although words "such as language conveying racial or religious epithets[] are considered offensive by most Americans," the Commission does not "extend[] the bounds of profanity to reach such language given constitutional considerations."[52]

The Commission's caution is consistent with settled First Amendment law. As the Supreme Court has explained, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[53] Even in the broadcast context, where courts in the past have applied a unique First Amendment standard, "the fact that society may find speech offensive" — much less "annoying" — "is not a sufficient reason for suppressing it."[54] Petitioners' expression of their personal views that the word "Redskins" causes them harm beyond personal offense falls far short of the "specific allegations of fact" required to make a *prima facie* claim in a Petition to Deny.[55] Moreover, to the extent the alleged harm caused by use of the word "Redskins" is based on listeners' reactions to the word,[56] the Supreme Court has made clear that "[l]isteners' reactions to speech are not the type of 'secondary effects'" that may justify a content-based regulation of speech.[57]

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[51] *Omnibus Order*, 21 FCC Rcd at 2669.

[52] *Id.*

[53] *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

[54] *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978).

[55] 47 U.S.C. § 309(d)(1).

[56] *See* Harjo Petition at 2.

[57] *RAV v. St. Paul*, 505 U.S. 377, 394 (1992)

There is no support in First Amendment law or Commission precedent for treating "Redskins" as sanctionable profanity, especially given that the team name is most commonly used in news and commentary — programming that the Commission has recognized requires the greatest leeway for stations' editorial judgment.[58] Courts have upheld the Commission's indecency regime with the understanding that its "potentially chilling effect ... will be tempered by the Commission's restrained enforcement policy."[59] Petitioners' apparent belief that the Commission should abandon any such restraint and embrace an unbounded view of its power to impose its views and tastes on broadcast licensees — and on the public — itself evinces a chilling disregard for the First Amendment.

III. PENALIZING THE STATION FOR USING THE WORD 'REDSKINS' WOULD BE UNLAWFUL.

Even if the Commission could proscribe the use of the word "Redskins" on broadcast stations — which it cannot — it nonetheless would be unlawful to deny KTTV's license renewal application on the basis of an abrupt and novel change in course. The Commission has never so much as suggested that airing the word "Redskins" — or even words more universally acknowledged as racial epithets — could be punishable under the Communications Act's prohibition on "profane" speech or under any other authority. Indeed, as explained above, the Commission's precedent is directly to the contrary.

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[58] *See Omnibus Remand Order*, 21 FCC Rcd at 13327 ("[W]e reaffirm our commitment to proceeding with caution in our evaluation of complaints involving news programming. ... [I]n light of the important First Amendment interests at stake as well as the crucial role that context plays in our indecency determinations, it is imperative that we proceed with the utmost restraint when it comes to news programming.").

[59] *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 n. 14 (D.C. Cir. 1988) ("*ACT I*").

Petitioners acknowledge that they are asking the Commission to break new legal ground.[60] But it is improper to engage in back-door rulemaking of general applicability in the context of an adjudicatory proceeding regarding a station's license renewal.[61] Moreover, constitutional Due Process requirements and the Administrative Procedure Act forbid the Commission from overriding KTTV's renewal expectancy, as established in Section 309(k) of the Communications Act, on the basis of a brand-new, previously unannounced prohibition. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required," and especially "rigorous adherence" to that principle is required when the regulation of speech is involved.[62] As the Supreme Court emphasized in reviewing the Commission's indecency policies regarding "fleeting expletives," the Commission may not penalize stations for failing to anticipate a reversal of the Commission's settled rules — particularly with respect to rules "that touch upon sensitive areas of basic First Amendment freedoms."[63] Nothing in the Commission's precedents could have given Fox or any other broadcaster fair notice that the Commission could or would penalize a station for referring to the Washington Redskins by the team's name. Indeed, given the Commission's consistent and emphatic insistence that it would *not* punish stations even for using

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[60] *See, e.g.*, Harjo Petition at 4-5 (asking Commission "to determine whether the repeated, continued, and totally unnecessary use" of the word "Redskins" is consistent the broadcasters' public-interest obligations); *id.* at 5 (arguing Commission should "expand" its understanding of obscenity or indecency to include use of "Redskins"); *id.* at 13 (asking Commission "to define the word 'profane' to include grossly derogatory racial slurs); *id.* at 16 (asking Commission to use a hearing in this proceeding as a means of conducting a "broader investigation" into whether to regulate "hate speech").

[61] *See Cox Radio, Inc.*, Letter, 28 FCC Rcd 5674, 5677 (MB 2013) ("It has long been Commission practice to make decisions that alter fundamental components of broadly applicable regulatory schemes in the context of rule making proceedings, not adjudications.").

[62] *FCC v. Fox Television Stations*, 132 S. Ct. 2307, 2317 (2012) ("*Fox II*").

[63] *Fox II*, 132 S. Ct. at 2318.

universally acknowledged racial epithets, denying KTTV's license renewal would be arbitrary, capricious, and unlawful.[64]

CONCLUSION

Petitioners no doubt sincerely object to the name of Washington's football team. They and others who share their views are free to exercise their own First Amendment rights to continue advocating against the name and to attempt to dissuade its use in mainstream culture. The Petitioners should not, however, be permitted to use their right to free expression as a means to suppress broadcasters' editorial choices, nor to dictate to other speakers which uses of the word "Redskins" are sufficiently "necessary" or worthwhile to be permissible.[65] And the Petitioners certainly should not be permitted to invoke the instrumentalities of government regulation to quash speech or ideas with which they disagree. The First Amendment no less protects broadcasters' rights to free speech and a free press than it safeguards Petitioners' own right to passionately disseminate their ideas.

For all the reasons stated herein, the Commission should act expeditiously to dismiss or deny the Petitions, and KTTV's license renewal should be granted forthwith.

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[64] *See Blanca Telephone Co. v. FCC*, 743 F. 3d 860, 865 (D.C. Cir. 2014) (FCC has "obligation not to treat similarly situated carriers differently without offering an adequate explanation"); *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) (remanding denial of renewal application where the renewal application of another applicant engaging in similar behavior had been granted). *See also* 5 U.S.C. § 706(2) (reviewing court shall hold unlawful and set aside agency action that is, *inter alia*, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or that is contrary to constitutional rights).

[65] *See* Harjo Petition at 1, 20.

Respectfully submitted,

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December 1, 2014

CERTIFICATE OF SERVICE

I, Michael Beder, an associate at Covington & Burling LLP, hereby certify that on this 1st day of December, 2014, I caused a copy of this Consolidated Opposition of Fox Television Stations, Inc. to Petitions To Deny to be served by U.S. First Class mail, postage prepaid, upon the following:

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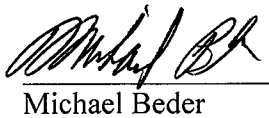

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